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**International
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TRIAL CHAMBER X

Before: Judge Antoine Kesia-Mbe Mindua, Presiding
Judge Tomoko Akane
Judge Kimberly Prost

SITUATION IN THE REPUBLIC OF MALI

**IN THE CASE OF
*THE PROSECUTOR V. AL HASSAN AG ABDOUL AZIZ AG MOHAMED
AG MAHMOUD***

Public

With confidential Annex A

Public redacted version of “Prosecution application under rule 68(2)(b) to introduce into evidence Witness P-0204’s and Witness P-0630’s prior recorded testimony and associated material, 9 December 2020, ICC-01/12-01/18-1196-Conf

Source: Office of the Prosecutor

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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Introduction

1. Pursuant to rule 68(2)(b) of the Rules of Procedure and Evidence (“Rules”), the Prosecution requests the authorisation of Trial Chamber X (“Chamber”) to introduce into evidence: (i) Witness P-0204 and Witness P-0630’s reports and associated work products thereto; and (ii) associated material comprised of credentials and contact notes in which Witness P-0204 and Witness P-0630 commented on development steps in order to build interactive platforms.

2. Witness P-0204 and Witness P-0630 are both technicians [REDACTED] who specialize in digital and interactive platforms. They are at the origin of two different platforms: the platform which was used as a visual presentation tool in the case of the Prosecutor against Ahmad Al Faqi Al Mahdi; and another platform which was used as a visual presentation tool in the current case during the opening statement and is meant to be used during the trial as well in order to help with the localization of certain places of interests directly relevant to the Al Hassan case and the charges.

3. Witness P-0204 and Witness P-0630’s prior recorded testimony and associated material are relevant to set out the locations of places of interest in cases such as the Islamic police, the *Hesbah* and the Islamic Tribunal as well as the locations of various incidents.

4. Witness P-0204 and Witness P-0630’s prior recorded testimony is probative and goes to proof of matters other than the acts and conduct of the Accused as required by rule 68(2)(b). In addition, it:
 - relates to issues that are not materially in dispute (the coordinates/locations of places of interest);
 - is of a cumulative or corroborative nature, in that other witnesses will give or have given oral testimony of similar facts;

- relates to background information;
- is such that the interests of justice are best served by its introduction; and
- has sufficient indicia of reliability.

5. All parties will benefit from an expedited presentation of the Prosecution's case. Admitting the prior recorded testimony of these two witnesses under rule 68(2)(b) best serves the interest of justice and the determination of the truth.

6. The technical and cumulative nature of the evidence of these two witnesses makes it unnecessary for the witnesses to appear for cross-examination. Granting the Prosecution's request would not cause any unfair prejudice to the Accused, who remains in a position to challenge the witnesses' evidence through means other than the witnesses cross-examination.

7. The Prosecution seeks the introduction of this material on a conditional basis, subject to the subsequent transmission of Witness P-0204's and Witness P-0630's certified declarations pursuant to rule 68(2)(b)(ii) and (iii).

Confidentiality

8. Pursuant to regulation 23*bis*(1) of the Regulations of the Court, the Prosecution files this submission and its accompanying annex as confidential because they contain confidential information including information regarding a Prosecution witness. The Prosecution shall file a public redacted version in due course.

Applicable Law

9. In its Directions on the conduct of proceedings, the Chamber determined that parties may file applications for the admission of prior recorded testimonies pursuant to rule 68(2) of the Rules.¹

10. Pursuant to rule 68(2)(b) of the Rules, the Chamber may allow the introduction of the previously recorded testimony of a witness who is not present before the Chamber when that prior recorded testimony: (i) goes to proof of “a matter other than the acts and conduct of the accused”; and (ii) is accompanied by a declaration by the testifying person, witnessed by a person authorised by the Chamber or in accordance with the law and procedure of a State, as detailed in rule 68(2)(b)(ii) and (iii) of the Rules.

11. As generally required in all instances of introduction of prior recorded testimony under rule 68 of the Rules, this introduction must also not be prejudicial to or inconsistent with the rights of the accused.² The decision of whether to introduce a prior recorded testimony pursuant to this provision is a discretionary one, and the entire purpose of rule 68(2)(b) of the Rules is to identify situations where it is not necessary to examine witnesses while preserving a fair and expeditious trial.³ When such situations are identified and pursuant to the criteria set out in rule 68(2)(b) of the Rules, prior recorded testimony may be introduced pursuant to this provision.

¹ Directions on the conduct of proceedings, ICC-01/12-01/18-789-AnxA, para. 80.

² ICC-01/12-01/18-1111-Red, Decision on the introduction of P-0598’s evidence pursuant to Rule 68(2)(b) of the Rules, para. 7.

³ ICC-01/12-01/18-1111-Red, Decision on the introduction of P-0598’s evidence pursuant to Rule 68(2)(b) of the Rules, para. 7.

12. In doing so, the Chamber will defer to its eventual deliberation for its judgment, the full consideration of the standard evidentiary criteria for such prior recorded testimony, in particular in terms of its relevance and probative value.⁴

Prosecution's Submissions

I. The prior recorded testimony of Witness P-0204 and Witness P-0630 should be introduced into evidence pursuant to rule 68(2)(b)

13. Pursuant to rule 68(2)(b) of the Rules, the Prosecution seeks to introduce into evidence: (i) Witness P-0204 and Witness P-0630's reports and associated work products thereto; and (ii) associated material comprised of credentials and contact notes in which Witness P-0204 and Witness P-0630 commented on development steps in order to build interactive platforms. The prior recorded testimony of these two witnesses should be introduced into evidence for the reasons set out below.

a. The material of Witness P-0204 and Witness P-0630 constitutes "prior recorded testimony" in the sense of rule 68

14. The Chamber has previously authorised the introduction of expert witness P-0598's report pursuant to rule 68(2)(b).⁵ As a matter of fact, it was the Defence's proposal to introduce that expert report *via* rule 68(2)(b).

15. The technical reports of Witness P-0204 and Witness P-0630 are similar to an expert report and thus constitute a "prior recorded testimony" in the sense of rule 68(2)(b). Indeed, both Witness P-0204 and Witness P-0630 can be considered as persons "who, by virtue of some specialised knowledge, skill or training can assist

⁴ ICC-01/12-01/18-1111-Red, Decision on the introduction of P-0598's evidence pursuant to Rule 68(2)(b) of the Rules, para. 7, citing *inter alia* Directions on the conduct of proceedings, ICC-01/12-01/18-789-AnxA, para.34(i) and 34(ii).

⁵ ICC-01/12-01/18-1111-Red, Decision on the introduction of P-0598's evidence pursuant to Rule 68(2)(b) of the Rules, para. 11. *See also* ICC-01/12-01/18-1111-Red, Decision on the introduction of P-0598's evidence pursuant to Rule 68(2)(b) of the Rules, para. 79(i) and (ii). *See further* para. 63(i) and (ii) (in the context of rule 68(3)).

the Chamber in understanding or determining an issue of a technical nature that is in dispute.”⁶ Further, (i) they are both specialised in interactive digital platforms; (ii) the platforms they created will assist the Chamber in determining the geolocation of key locations and sites relevant to the case; (iii) the content of their reports and the platforms themselves fall directly within their area of specialisation; and (iv) the content of their reports and platforms does not usurp the functions of the Chamber as the ultimate arbiter of fact and law.⁷

b. The prior recorded testimony of Witness P-0204 and Witness P-0630 goes to proof of matters other than the acts and conduct of the Accused

16. The prior recorded testimony of Witness P-0204 and Witness P-0630 does not relate to the acts and conduct of the Accused as defined in the case-law of this and other courts.

17. Witness P-0204 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] provided an interactive platform of Timbuktu combining various items (videos, photographs, satellite imagery, etc.) related to sites where

⁶ Trial Chamber VI, Prosecutor v. Bosco Ntaganda, Decision on Defence preliminary challenges to Prosecution’s expert witnesses, 9 February 2016, ICC-01/04-02-06-1159, para. 7 (‘Ntaganda Expert Decision’); Trial Chamber V-A, Prosecutor v. William Samoei Ruto and Joshua Arap Sang, Decision on Sang Defence Application to exclude Expert Report of Mr Hervé Maupéu, 7 August 2013, ICC-01/09-01/11-844, para. 11; Referring to ICTY, Prosecutor v. Vujadin Popović et al., Decision on Joint Defence Interlocutory Appeal Concerning Status of Richard Butler as an Expert Witness, 30 January 2008, IT-05-88-AR73.2, para. 27 (‘Popović Expert Appeal’); ICTY, Prosecutor v. Ratko Mladić, Decision on Defence Request to Disqualify Richard Butler as an Expert and Bar the Prosecution from Presenting his Reports, 19 October 2012, IT-09-92-T, para. 8 (‘Mladić Expert Decision’).

⁷ See Ntaganda Expert Decision, ICC-01/04-02/06-1159, para. 8. Referring to Ruto and Sang Expert Decision, ICC-01/09-01/11-844, para. 12; Popović Expert Appeal, IT-05-88-AR73.2, para. 27; Mladić Expert Decision, IT-09-92-T, para. 8. See also ICTY, Prosecutor v. Vujadin Popović et al., Decision on the Admissibility of the Expert Report and Proposed Expert Testimony of Professor Schabas, 1 July 2008, IT-05-88-T, para. 7 (‘Popović Schabas Decision’).

destruction of mausoleums occurred. He also contributed together with P-0630 to a second interactive platform of Timbuktu showing various sites.

18. P-0630 is a specialist in interactive platforms. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

19. These two interactive platforms will be used for the sole purpose of visualizing “in situ” evidence during the proceedings, and thus do not relate to the acts and conduct of the Accused, even though the second interactive platform contains videos featuring the Accused, all of which have been or will be tendered in the record of the case and commented on by various other witnesses.

20. The first interactive platform of the city of Timbuktu focused on the destruction of mausoleums. This interactive platform was prepared in the Al Mahdi case by P-0204. It showcases different items, including satellite imagery gathered by UNOSAT⁸, 360-degree panoramas of various locations, videos ([REDACTED])

⁸ On which P-0064 already testified on 29 September 2020.

[REDACTED] for which P-0193 produced a geo-localisation analysis,⁹ and photographs taken by experts P-0057¹⁰ and P-0102.¹¹

21. This platform allows seeing where attacks directed against mausoleums took place, since the provided videos or photographs are inserted in the 360 degrees panoramas¹² that are linked to the satellite image of Timbuktu. It is a visual and spatial evidentiary digital platform that is capable of being operated at the Court and in compliance with the ICC system.¹³

22. A second interactive platform was created by both P-0204 and P-0630. This second platform was created for the Al Hassan case and is a more comprehensive interactive platform of Timbuktu,¹⁴ showing various sites, including a 3D reconstruction of the BMS, and incorporating various videos recorded in 2012,¹⁵ including some videos featuring the Accused.¹⁶ This platform allows seeing where charged incidents took place, since the provided videos or photographs are inserted in 360 degrees panoramas¹⁷ that are linked to a satellite image of Timbuktu.

23. As demonstrated during the opening statements of the Al Hassan case, this interactive platform is also capable of being operated at the Court and in compliance with the ICC system.

24. Although it does contain some videos featuring the Accused, the sole purpose for which this interactive digital platform was designed is to facilitate the

⁹ P-0193 already testified in relation to this analysis on the 18 and 21 September 2020. [REDACTED]

¹⁰ P-0057 already testified on that evidence collection on 11 November 2020.

¹¹ P-0102 already testified on the materials he collected that were used to create the 360 degree panoramic views on 14 September 2020.

¹² P-0635 produced a geo-localisation analysis of that material. P-0102 already testified on the materials he collected that were used to create the 360 degree panoramic views on 14 September 2020.

¹³ A public version is available at [REDACTED] and a confidential one at [REDACTED].

¹⁴ See [REDACTED].

¹⁵ [REDACTED].

¹⁶ [REDACTED].

¹⁷ P-0635 produced a geo-localisation analysis of that material. P-0102 already testified on the materials he collected that were used to create the 360 degree panoramic views on 14 September 2020.

organisation, analysis and presentation of the evidence documenting charged crimes in the case. It is therefore a visual tool that does not supersede or replace the submission of evidence that it contains. It is for this reason that the assets and materials it is composed of have been or will be submitted into evidence through witnesses separately. It is also for this reason that the videos contained in this platform which feature the Accused have already been commented on in the courtroom during trial and submitted through various witnesses.¹⁸

25. As previously mentioned above, P-0204 and P-0630's prior recorded testimony and associated material is therefore relevant to set out the locations of places of interest where alleged crimes occurred such as the Islamic police, the *Hesbah*, the Islamic Tribunal, and the location of the various floggings, the amputation and the execution, as well as the location of the various attacked mausoleums in Timbuktu.

c. The prior recorded testimony has sufficient indicia of reliability

26. The prior recorded testimony of Witness P-0204 and Witness P-0630 bears sufficient indicia of reliability because it is truthful, authentic, consistent and was provided voluntarily. There is no indication of a motive for the witnesses to fabricate or distort their account. The following factors also support the reliability of the evidence.

27. The technical reports were given voluntarily and drafted by the witnesses. They contain detailed information in relation to the steps taken to create each platform, the methodology, the tools and the type of assets used.¹⁹

28. In addition, both witnesses are well-placed to provide evidence on digital platforms because, as shown in their respective CVs, they are specialists in this field.²⁰

¹⁸ E.g. [REDACTED].

¹⁹ See [REDACTED] and [REDACTED].

d. The prior recorded testimony is relevant and has *prima facie* probative value

29. As explained in more detail above, the prior recorded testimony of Witness P-0204 and P-0630 is relevant to set out the locations of places of interest in the case and the location of the various incidents.

30. As shown above, the prior recorded testimony has *prima facie* probative value because it bears sufficient indicia of reliability.

e. Additional rule 68(2)(b)(i) factors militate in favour of introducing Witness P-0204 and Witness P-0630's prior recorded testimony under rule 68(2)(b)

31. One of the factors that the Chamber must consider in determining whether the introduction of prior recorded testimony that goes to proof of a matter other than the acts and conduct of the accused may be allowed is (i) whether the prior recorded testimony relates to background information and (ii) is such that the interests of justice are best served by its introduction in that way.

i. The prior recorded testimony relates to background information

32. In the case of Witness P-0204 and Witness P-0630, both criteria are met: the platforms provide a map of Timbuktu which is useful to locate places of interest and link what witnesses who were in Timbuktu at the time of the events will describe during their respective testimonies. The mapping of the city and of some of its buildings and streets also contribute to the determination of the truth by allowing to check the accuracy of the various witness accounts.

33. The platforms have further been created by using materials collected on the ground by experts who took a series of images depicting the city [REDACTED]

²⁰ See P-0630's CV at [REDACTED] and P-0204's CV at [REDACTED].

██████████ – together with GPS coordinates – *i.e.* landscape imagery which cannot be contested and does not relate to the acts and conducts of the accused. Further, as set out above, the experts P-0057 and P-0102 who collected these materials have already testified in this case.²¹

ii. The interests of justice are best served by the admission of the prior recorded testimony

34. By its terms, rule 68(2)(b) does not unfairly prejudice the Defence by permitting the introduction of evidence that will not be subject to cross-examination when this evidence is unrelated to the acts and conduct of an accused. That both parties can avail themselves of this provision further underscores its inherent neutrality and that it advances the interests of justice.

35. Introducing into evidence the prior recorded testimony of Witness P-0204 and Witness P-0630 under rule 68(2)(b) would advance the interests of justice and contribute to a fair and expeditious trial by enabling the presentation of evidence in a more concise and streamlined manner without causing undue prejudice to the fair trial rights of the Accused. This aligns with the stated goal behind the rule's adoption which was to "reduce the length of ICC proceedings and streamline evidence presentation, while also having due regard to the principles of fairness and the rights of the accused."²²

f. Introduction into evidence of the prior recorded testimony causes no undue prejudice to the Accused

36. As required under rule 68(1), the introduction into evidence pursuant to rule 68(2)(b) of Witness P-0204 and Witness P-0630's prior recorded testimony "would not be prejudicial to or inconsistent with the rights of the Accused". The inability to

²¹ ██████████.

²² [ICC-ASP/12/37/Add.1](#), Assembly of State Parties, Study Group on Governance, Working Group on Lessons Learnt: Recommendation on a proposal to amend rule 68 of the Rules of Procedure and Evidence (Prior Recorded Testimony), 31 October 2013, para. 11.

cross-examine these witnesses on their evidence, and the admission of the evidence at this stage of the proceedings, does not deprive the Accused of his right and opportunity to challenge the evidence. As a matter of fact, the Defence already had and used this opportunity during P-0057, P-0064, P-0102 and P-0193's testimonies. The Defence also retains the possibility to cross-examine other *viva voce* witnesses on the basis of information contained in the platforms, lead contradictory evidence during the Defence case, or—to the extent that discrepancies would exist with any other evidence—address the prior testimony during closing submissions and advance arguments on the weight to be attributed to the prior recorded testimony.

II. Brief description of the associated material

37. Section II of Annex A lists the CVs of the two witnesses as well as contact notes with Witness P-0204 and Witness P-0630 associated with their prior recorded testimony, which the Prosecution also seeks to introduce into evidence under rule 68(2)(b). The contact notes contain information on the design and creation process of the platforms which are referred to within the reports in the methodology and list of assets used for the creation of the platforms by Witness P-0630 and Witness P-0204. As such they are part of the creation process that led to the witnesses reports and associated work products and are relevant to the case against the Accused. They further help understanding the work performed by Witness P-0204 and Witness P-0630 on the interactive platforms.

38. Trial Chamber VI held in *Ntaganda* that “exhibits associated with a previously recorded testimony are admissible if the witness uses or explains them in the prior recorded testimony, and particularly when these are necessary to read and understand the prior recorded testimony being introduced.”²³ The Chamber has also

²³ ICC-01/04-02/06-T-105-Red-ENG ET, *Prosecutor v. Ntaganda*, Trial Hearing of 20 June 2016, p.93, ln.24 - p.94, ln.7 (in the context of rule 68(3)). See also *Prosecutor v. Ntaganda*, ICC-01/04-02/06-1205, Decision on Prosecution application under Rule 68(2)(c) of the Rules for admission of prior recorded testimony of Witness P-0103, para. 7 (in the context of rule 68(2)(c)); ICC-01/04-02/06-1029, para. 23, 35 (in the context of rule

expressed the view that “it is the [prior recorded] testimony as a whole which will be introduced pursuant to Rule 68 of the Rules”,²⁴ and that as the statement in its entirety will be before the Chamber it follows that material used with the witness must be introduced under the applicable rule.²⁵

39. The Prosecution submits that explanations as to the creation and the methodology used for the creation of the platforms are clearly set out in the reports of P-0204 and P-0630.²⁶

III. Provision of certified declaration for Witness P-0204 and Witness P-0630

40. The Prosecution requests that the Chamber authorise the introduction into evidence under rule 68(2)(b) of the prior recorded testimony of Witness P-0204 and P-0630 and associated material on a conditional basis pending the submission of the certified declaration of these witnesses.

Conclusion

41. For the foregoing reasons, the Prosecution requests that the Chamber conditionally authorise the introduction into evidence of Witness P-0204 and Witness P-0630’s prior recorded testimony and associated material, pending submission of the certified declaration.



Fatou Bensouda, Prosecutor

Dated this 9 December 2020

At The Hague, The Netherlands

68(2)(c)); *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-1938-Corr-Red2, Decision on Prosecution Request for Admission of Prior Recorded (in the context of rule 68 in general), para. 33.

²⁴ ICC-01/12-01/18-987-Red, Decision on Prosecution’s requests to introduce prior recorded testimonies under Rule 68(3) of the Rules, para. 13. *See also* para. 15.

²⁵ *See* ICC-01/12-01/18-987-Red, Decision on Prosecution’s requests to introduce prior recorded testimonies under Rule 68(3) of the Rules, para. 17 (in the context of rule 68(3)).

²⁶ *See* [REDACTED] and [REDACTED].